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ALEXANDER L. STEVAS
CLERK

No. 80-1437

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

v.

ARTHUR EDWARD SHEEHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

PETITION FILED: FEBRUARY 23, 1981
PETITION GRANTED: OCTOBER 5, 1981

TABLE OF CONTENTS

	Page
District court docket entries	1
Complaint, with exhibits, filed February 24, 1978	3
Answer, filed May 1, 1978	31
Defendant's motion to dismiss or in the alternative for summary judgment, filed July 21, 1978	37
Excerpts from attachments to memorandum of points and authorities in support of defendant's motion to dismiss or in the aiternative for summary judgment	39
Notice of appeal, filed February 13, 1979	47
Order granting certiorari	48

RELEVENT DOCKET ENTRIES

DATE	PROCEEDINGS
1978	
Feb 24	Filed COMPLAINT (w/ Exhibits A-F) and Issued SUMMONS (4).
Mar 8	Filed MARSHALS RETURN on SUMMONS executed 3-3-78 by serving Army & Air Force Exchange Service by delivery to Stephen N. Thompkins, attorney; by serving U.S. Attorney by delivery to Brenda Schreuders; and by serving Attorney General, Washington, D.C.—two copies by certified mail.
May 1	Filed Defendant's ANSWER.
June 21	ORDER SETTING CASE ON Non jury DOCKET Sept. 25, 1978 TO ATTORNEYS 6-21-78 RWP.
July 21	Filed DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.
July 21	Filed MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, with attachments. (separate instrument)
Aug 18	Filed PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT.
Sep 11	Filed DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF.
Sep 19	Filed ORDER scheduling a hearing in this case on October 16, 1978 at 10:00 A.M.; all motions pending as of the date of this order will be considered. RWP copies mailed to counsel
Oct 17	Filed ORDER that Plaintiff shall respond to Defendant's motion to dismiss or in the alternative for summary judgment no later than October 27, 1978. RWP copies mailed to counsel

DATE	PROCEEDINGS

1978

Oct 27 Filed MEMORANDUM OF AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

Dec 1 Filed DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

1979

Jan 15 Filed ORDER granting Defendant's Motion to Dismiss for the reason that the Court lacks subject matter jurisdiction over the instant action; accordingly, this cause is ordered dismissed and is to be removed by the Clerk from the docket of this Court. WP
copies mailed to counsel

Feb 13 Filed NOTICE OF APPEAL by ARTHUR EDWARD SHEEHAN from Order Granting Defendant's Motion to Dismiss entered January 15, 1979.

Feb 14 Mailed copy of Notice of Appeal to 5th Circuit Court of Appeals together with docket entries; cy to Judge; cy to Court Reporter

Feb 14 Filed Plaintiff's NOTICE OF FILING CASH BOND ($250.00).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3-78-0222F

ARTHUR EDWARD SHEEHAN

vs.

ARMY & AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND THE AIR FORCE

[Filed Feb. 24, 1978]

COMPLAINT

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 701-706, 28 USC §§ 1346(a)(2) and 1361, and the U.S. Constitution.

PARTIES

2. Plaintiff Arthur Edward Sheehan (hereinafter sometimes referred to as "Sheehan") is a resident of Dallas County, Texas.

3. Defendant Army and Air Force Exchange Service (hereinafter sometimes referred to as "AAFES") is a non-appropriated funded government agency within the Department of Defense, and specifically under the direct control and jurisdiction of the Departments of the Army and the Air Force.

FACTS

COUNT ONE

4. On or about July 2, 1962, Plaintiff was first employed by AAFES as a Computer Programmer. In and about 1967, Sheehan was accepted into a special program

of AAFES known as the Executive Management Program (hereinafter sometimes referred to as "EMP").

5. As an EMP employee, Plaintiff had certain special obligations and special benefits different from other AAFES employees. Included within the benefits, inter alia, to EMP employees were:

1. Retention priority in reduction in force;
2. Longer notice periods based on length of service in case of certain separations;
3. Triple indemnity accidental death benefits and supplemental life insurance benefits in accordance with the AAFES Group Insurance Plan;
4. Supplemental Retirements Benefit; and
5. Retention of personal grade regardless of assignment.

Included within the obligations, inter alia, of EMP employees were:

1. Obligation to develop and improve abilities and efficiencies to the fullest extent practical in fulfillment of the purpose and principals of the program;
2. Obligation to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that the individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer;
3. Obligated to accept the terms of EMP early retirement.

6. When an employee, including an EMP employee, is terminated from AAFES, he is submitted to a procedure

commonly known as the "Separation Procedure." According to the rules and regulations of AAFES, the separated (terminated) employee has an automatic right of appeal to an Appellate Authority, the next highest management authority. The Appellate Authority is the individual(s) who review the evidence submitted at the separation hearing and during the appeal process to determine if the separation shall stand. According to AAFES rules and regulations the Appellate Authority cannot be the same as the Separation Authority.

7. One of the benefits of being an EMP employee and according to the regulations of AAFES is that the EMP program is administered specifically by the Commander of AAFES. In cases involving the separation (termination) of EMP employees, the Commander, AAFES, is the management official with the sole authority to authorize and approve of the separation of such EMP employee.

8. On November 18, 1975, Plaintiff was arrested for violation of state drug laws and on March 1, 1976, plead guilty to four misdemeanor offenses of simple possession of illegal drugs.

9. By letter dated March 16, 1976, Plaintiff was given Advance Notice of Separation for Cause from AAFES. The management official in charge of such separation of Plaintiff was the Commander, AAFES. Attached hereto is Exhibit "A", and incorporated herein by reference for all purposes is the Advance Notice of Separation for Cause dated 16 March 1976. In particular, Paragraph 2 of said Advance Notice states:

> "This is to advise you that the commander, Army and Air Force Exchange Service (AAFES) has granted prior approval of your separation from employment with the AAFES for cause. . . ."

10. In accordance with the separation process and AAFES rules and regulations, the Commander conducted an investigation. Attached hereto as Exhibit "B", and

incorporated herein by reference for all purposes, is a copy of Defendant's memorandum dated 5 February, 1976. In particular, Paragraph 4 states:

> "An investigation of the Arthur Sheehan case is presently being conducted by the Commander, AAFES. . . ."

11. The Commander, AAFES, authorized his agent, James J. Stapleton (hereinafter referred to as "Stapleton"), General Manager of Piedmont Area Exchange, to proceed with the Separation for Cause of Plaintiff. Attached hereto as Exhibit "C", and incorporated herein by reference for all purposes, is Stapleton's memorandum dated 13 April 1976, notifying the Chief of Staff, Fort Jackson, South Carolina, of Stapleton's authority to act on behalf of the Commander AAFES.

12. Attached hereto as Exhibit "D", and incorporated herein by reference for all purposes, is the letter of Final Decision to Separate Plaintiff dated 14 April, 1976, Establishing the effective date of Plaintiff's separation as the close of business of 19 April, 1976. In particular, such letter states:

> "The basis of your separation is conduct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. . . ."

13. In accordance with the appellate procedure of AAFES, Plaintiff appealed. This matter was heard before a hearing examiner, Mr. R. J. Birkmeyer (hereinafter sometimes referred to as "Birkmeyer"), an attorney employed by AAFES. Attached hereto as Exhibit "E", and incorporated herein by reference for all purposes, is a copy of the decision of Birkmeyer styled Appeal of Adverse Action—Mr. Arthur E. Sheehan and dated 18 November, 1976.

14. Birkmeyer found, inter alia:

1. Plaintiff's conduct off the job did not reflect discredit on AAFES; and
2. Plaintiff's retention in some capacity was not compatible with the present interest of AAFES.

15. Among the recommendations made by Birkmeyer were:

1. Plaintiff was denied lack of administrative due process;
2. Plaintiff be reinstated with back pay to his former grade and transferred to an assignment outside the Southeast Exchange Region; and
3. That if the Commander determines the action inappropriate, that the matter be heard by the Appellate Authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

16. Recommendation number 3, Paragraph 15 *supra*, was based on AAFES regulations which provide that if the Commander, AAFES, is the Separation Authority, that the Appellate Authority will be the Chairman of the Board of Directors of AAFES.

17. In Plaintiff's case, the Appellate Authority was not the Chairman of the Board of Directors of AAFES but in fact was the Commander, AAFES, the same individual who originally separated Plaintiff.

18. The actions of the Commander in acting as both the Separation Authority and the Appellate Authority violated AAFES regulations and Plaintiff's right to a free and impartial appeal. Such actions on the part of the Commander, AAFES, denied Plaintiff due process.

19. In the alternative, Plaintiff would show that if such procedure is permitted and sanctioned by AAFES, then such action is unlawful and denies Plaintiff a fair and impartial hearing and due process of law.

20. As a result of the aforesaid actions by the Commander, AAFES, and AAFES, Plaintiff has suffered substantial damages including the following:

1. Lost wages in the amount that Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;
2. All other benefits, including accrued vacation, sick leave, and all retirement benefits;
3. Plaintiff was forced to move to seek employment elsewhere and incurred substantial expenses in attempting to find other employment;
4. Emotional stress and mental anguish.

21. The actions on the part of Defendant was willful and malicious and Plaintiff was forced to retain counsel to seek redress. As a result Plaintiff has incurred substantial attorney fees for which Defendant should pay as part of punitive damages.

COUNT TWO

22. Plaintiff hereby herein incorporates Paragraphs 1 through 21 as if fully set out herein.

23. Attached hereto as Exhibit "F", and incorporated herein by reference for all purposes, is the letter of C. W. Hospelhorn, Major General, U.S.A. Commander, dated 20 December 1976, advising Plaintiff that his appeal was denied and that Hospelhorn's decision was final and not subject to further appeal or review.

24. The decision denying Plaintiff's appeal was:

1. Arbitrary, capricious, an abuse of discretion, and not in accordance with law;
2. Contrary to Plaintiff's constitutional right, power and privileges;
3. In excess of statutory authority and short of statutory right;

4. Without observation of procedures required by law;
5. The decision of C. W. Hospelhorn was unsupported by substantial evidence, expecially in light of the findings of Birkmeyer; and
6. The actions of C. W. Hospelhorn and AAFES were unwarranted by the facts of Plaintiff's case.

25. As a result of the aforesaid actions by the Commander, AAFES, and AAFES, Plaintiff has suffered substantial damages including the following:

1. Lost wages in the amount that Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;
2. All other benefits, including accrued vacation, sick leave, and all retirement benefits;
3. Plaintiff was forced to move to seek employment elsewhere and incurred substantial expenses in attempting to find other employment;
4. Emotional stress and mental anguish.

26. The actions on the part of Defendant was willful and malicious and Plaintiff was forced to retain counsel to seek redress. As a result Plaintiff has incurred substantial attorney fees for which Defendant should pay as part of punitive damages.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays:

1. Defendant be cited to appear herein;
2. That upon final hearing hereof, Plaintiff have judgment against the Defendant for the difference in the wages Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;

3. That Plaintiff recover all other benefits, including accrued vacation, sick leave, and all other retirement benefits for which he would have been entitled;
4. That Plaintiff recover all costs and expenses he incurred in seeking employment elsewhere;
5. That Plaintiff recover damages for his mental stress and mental anguish;
6. That the Commander's decision to separate Plaintiff be set aside and Plaintiff reinstated in a position no lower than UA13 and reinstatement be at his former grade in accordance with Paragraph 29, Exchange Service Manual 15-5;
7. That Plaintiff recover punitive damages, attorney fees and court costs.

Respectfully submitted,

LAW OFFICES OF IRA E. TOBOLOWSKY

By /s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY
1900 Southland Center
Dallas, Texas 75201
214/742-9205

EXHIBIT "A"

SE-PIAX 16 March 1975

SUBJECT: Advance Notice of Separation for Cause

Mr. Arthur E. Sheehan

1. References:

a. Exchange Service Bulletin (ESB) No. 247, Personnel Relations, dated 2 July 1975.

b. Chapter 1, paragraph 1-3f(6), AR 600-50, Standards of Conduct.

c. Paragraph 1-14, Standards of Conduct, AR 60-21/AFR 147-15, Exchange Service Personnel Policies, 12 November 1974.

d. Report of Investigation No. 75-CID053-22675 from the Criminal Investigation Department, dated 30 January 1976.

2. This is to advise you that the Commander, Army and Air Force Exchange Service (AAFES), has granted prior approval of your separation from employment with the AAFES for cause. It is proposed that the separation will be effective 30 calendar days following your receipt of this advance notice. Your separation is in accordance with paragraph 13 of ESB 247, Personnel Relations, 2 July 1975, and paragraph 5-9e, AR 60-21/AFR 147-15.

3. The reason for your separation is conduct off the job which reflects discredit on the AAFES and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. The specific basis for this action is that on or about 17 November 1975, at Irmo, South Carolina, you had in your possession approximately: 334 Amphetamine tablets (a Schedule I substance), 11.5 grams of MDA (3, 4 Methylenedioxy Amphetamine—also a Schedule I substance), a quantity of PCP (Phencyclidine Hydrocloride), a Sched-

ule III substance, and 40 marijuana plants. The possession of these drugs and plants is in violation of Title 21, U.S. Code annotated, Section 844. Further, on 1 March 1976, in the Lexington County General Sessions Court, Lexington, South Carolina, you were found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. You were sentenced to 18 months probation and received a $1000 fine.

4. You are advised that you have the opportunity to explain the circumstances which led to this action, and to set forth your views in this matter; your reply may be oral and/or in writing and should be submitted to the undersigned. In this reply, you may set forth any matters, explanations, or denials that you may deem appropriate. You may be accompanied by a representative during any oral explanation, if you so request. However, you must bear any expense involved in making a reply.

5. You are further advised that your reply must be filed within five (5) work days of receipt of this advance notice of proposed separation. However, upon good cause this period will be extended up to an additional five (5) work days for a total of ten (10) work days from the date you receive this notice, provided your request for extension is received within five (5) work days of your acknowledgement of this advance notice of proposed separation for cause. Your reply, either verbally or in writing, or both, will be given full consideration before a final decision is made.

6. A written final decision will be made within ten (10) work days of receipt of your verbal or written reply. However, if you do not reply to this notice, within the authorized five (5) work day reply period, a written decision will be made following the expiration of the authorized reply period.

7. During the advance notice of separation period you will be placed on administrative leave in accordance with the provisions of paragraph 24b, ESB 247.

8. It is requested that you acknowledge receipt of this notice by signing, dating, and returning the attached copy to this office.

Signed

JAMES J. STAPLETON
General Manager

CF: SEER-PE
AAFES-PE-M

Receipt Acknowledged: /s/ A. E. Sheehan

Date: 16 March 76

DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

REFERENCE OR OFFICE SYMBOL	SUBJECT
ATZJ-PAPX- 5 Feb 76	Incident Involving Shopping Center Manager

TO: THRU: DPCA TO: C of S

FROM: Post Exchange

DATE: 5 February 1976

CMT 1: Link/vad/767-2346

1. Reference our DF dated 18 November 1975, subject as above, copy inclosed.

2. Mr. Arthur Sheehan was returned to duty effective 1230 hours today, 5 Feb 76, in accordance with paragraph 5-29 b (8), AR 60-21/AFR 147-15, pending completion of an investigation of criminal charges against him.

3. Mr. Sheehan is performing duties as assigned by the undersigned. He will not return to his former position of Shopping Center Manager, Fort Jackson Exchange. His replacement has been identified and will report for duty in two weeks.

4. An investigation of the Arthur Sheehan case is presently being conducted by the Commander, AAFES under the provisions of paragraph 5-9 d and e, AR 60-21/AFR 147-15. I will apprize you of further development in this case as it occurs.

Paul E Stapleton

JAMES J. STAPLETON
General Manager

3 Incl
1. Tab A
2. Tab B
3. Tab C

CF: PMO (LTC O'Shaughnessy)

Info

DA FORM 2496-1 REPLACES DD FORM 95 (SEP 67), WHICH IS OBSOLETE.

EXHIBIT "B"

DISPOSITION FORM

For use of this form, see AR 340-15; proponent agency is The Adjutant General's O

REFERENCE OR OFFICE SYMBOL	SUBJECT
ATZJ-PAPX	Mr. Arthur E. Sheehan, Former PX Shopping Center Manager

TO THRU: DPCA

FROM: Post Exchange

DATE: 13 Apr 76

CMT: Mr. Stapleton/lb/782-5103

TO: C of S

1. Reference is made to DF, same subject, 16 Mar 76, copy inclosed.

2. We were advised this date by Hq, AAFES to proceed with the separation for cause of Mr. Arthur Sheehan, former PX Shopping Center Manager, which will be effective with the close of business 19 April 1976.

JAMES S. STAPLETON
General Manager

1 Incl
as

CF: PMO (LTC O'Shaughnessy)
3d CID

TO

Info:
CG
DCG
Co[illegible]
[illegible]
S[illegible]
J[illegible]
CSM

FOR OFFICIAL USE ONLY

DA FORM 2496 1 FEB 63 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE USED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED. * U.S. GPO: 1974-540-543/61

16

EXHIBIT "C"

EXHIBIT "D"

SE-PIAX 14 April 1976

SUBJECT: Final Decision to Separate

Mr. Arthur E. Sheehan
3500 Fernandina Road, Apt. K-3
Columbia, SC 29210

1. References.

a. Exchange Service Bulletin (ESB) No. 247, Personnel Relations, dated 2 July 1975.

b. Chapter 1, Paragraph 1-3f(6), AR 600-50, Standards of Conduct.

c. Paragraph 1-14, Standards of Conduct, AR 60-21/AFR 147-15, Exchange Service Personnel Policies, dated 12 November 1974.

d. Report of Investigation No. 75-CID063-22675 from the Criminal Investigation Department, dated 30 January 1976.

e. Southeast Exchange Region, PIAX letter, dated 16 March 1976, subject: Advance Notice of Separation for Cause.

f. Your letter dated 26 March 1976, to General Manager, Piedmont Area Exchange, subject: Advance Notice of Separation for Cause.

g. Your letter dated 7 April 1976 to General Manager, Piedmont Area Exchange, subject: Advance Notice of Separation for Cause.

2. This is to advise that full consideration has been given to your written replies of 26 March 1976 and 7 April 1976 concerning your advance notice of separation for cause. However, in view of the entire weight of evidence which resulted in your plea of guilty to charges of one count of simple possession of marijuana and three counts of simple possession of illegal drugs, it is my final decision to separate you for cause under the provisions

of Paragraph 13, ESB No. 247, Personnel Relations, dated 2 July 1975. The basis for your separation is conduct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. Contrary to your reply, the fact that you were arrested on drug charges was widely known in the Piedmont Area Exchange. Your absence from your job was noticed, and the reason for the absence soon became common knowledge. Additionally, local Military Police and Criminal Investigation Division (CID) authorities immediately apprized the Fort Jackson command group of your involvement in the drug affair with a Fort Jackson soldier. I was requested by the Fort Jackson command group to brief them on the incident and to keep them abreast of follow-on developments, and action was initiated by the Commander, Fort Jackson, to bar you from the post, which action is still pending. As to your physical and metal health problems, there is no record at this Exchange that you ever brought the condition to management's attention prior to your arrest. If you had done so, I would have certainly authorized appropriate leave time for medical treatment.

3. Please be advised that this action is taken based upon the same information provided to you pursuant to your Freedom of Information Act request. No outside information contained in the CID report is relied upon as a predicate for this action.

4. The effective date of your separation will be the close of business, 19 April 1976.

5. You are advised that within twenty-one (21) calendar days of receipt of this final decision, you may initiate an appeal of this adverse action under the provisions of Paragraph 81-98, ESB No. 247. Your appeal must contain a statement that you either desire or do not desire an evidentiary hearing. Assistance as to the format and

procedures involved in filing your appeal will be available from the Personnel Manager, Piedmont Area Exchange. Additionally, you have the right to be represented by counsel or any other individual which you may secure at your own expense to present your appeal.

6. Since Federal Unemployment Compensation may be available, you are advised that you may apply at 200 Assembly Street, Columbia, South Carolina.

7. It is requested that you acknowledge receipt of this final decision by signing and dating the attached copy of this letter.

Signed

JAMES J. STAPLETON
General Manager

Receipt Acknowledged: /s/ A. E. Sheehan

Date: 16 April 76

EXHIBIT "E"

ARMY AND AIR FORCE EXCHANGE SERVICE
STAFF SUMMARY MEMORANDUM

No.	Office	Action
1	General Counsel	Review and Coordination
2	Assistant to Commander	Information
3	Chief of Staff	Concurrence
4	Deputy Commander	Information
5	Commander	Signature

Signature (Full Name)	Date
Illegible	13/12/76
Illegible	16/12/76
Illegible	17 Dec. 76

Full Name of Writer:	Telephone Number:	Date:
R. J. Birkmeyer	3700	18 November 1976

Subject:
Appeal of Adverse Action—Mr. Arthur E. Sheehan

Summary:

1. References:

a. Army Regulation (AR) 60-21/Air Force Regulation (AFR) 147-15.

b. Exchange Service Bulletin (ESB) Number 247, dated 2 July 1975.

c. Exchange Service Manual (ESM) 15-5, dated 15 October 1975.

2. *Introduction.* Attached is the complete record of an appeal filed by Mr. Arthur E. Sheehan as a result of his separation for cause. The separation for cause is an adverse personnel action subject to an appeal to the Commander, Army and Air Force Exchange Service (AAFES), under the provisions of references 1a and 1b.

3. All relevant documents received by the hearing examiner are attached in chronological order. Only certain of those to which direct reference is made have been marked by tabs. A chronology of the events of the appeal is as follows:

a. At approximately 0030 hours on 18 November 1975, Mr. Sheehan was arrested at his place of residence by Lexington County (South Carolina) Sheriff's Department in conjunction with officers of CID attached to Fort Jackson.

b. Based upon information provided by CID, later on the same day the General Manager (GM), Piedmont Area Exchange (PIAX) forwarded a Serious Incident Report to the Chief, Southeast Exchange Region (SEER). In that report, he provided a copy of the Disposition Form (DA 2496) by which he had advised the Fort Jackson Command that Mr. Sheehan had been apprehended during the early morning hours of 18 November 1975 for possession of drugs. The report contained various pieces of information, some correct and some incorrect, including allegations that (1) both an Army enlisted man, Specialist 5 Cree and a Mr. Rome, civilian (both of whom allegedly had drug abuse histories) were residing in Mr. Sheehan's apartment, (2) three types of drugs (LSD, MDA and amphetamines) worth approximately $2,139 at "street value" were found in Mr. Sheehan's bedroom, and (3) a notebook allegedly belonging to Mr. Sheehan was also found in which drug transactions were noted along with "several devices normally associated with drugs". At the time, Mr. Sheehan was being held in the Lexington County Jail, Lexington, South Carolina, pending a preliminary hearing. He was placed on Administrative Leave on the same date.

c. On 19 November 1975 a follow up report was provided the Chief, SEER by the GM, PIAX. That report indicated that Mr. Sheehan had been charged with (1) simple possession of marijuana, (2) possession with intent to distribute MDA, (3) possession with intent to

distribute LSD and (4) possession with intent to distribute amphetamines. The report, presumably prepared and forwarded less than 48 hours following Mr. Sheehan's arrest, indicated that it appeared "highly unlikely that Mr. Sheehan will never return to his current assignment", "a possibility that Mr. Sheehan will be barred from the post what with his involvement with a Fort Jackson soldier", and recommended that action be taken to request a replacement for Mr. Sheehan. On 24 November 1975 Mr. Sheehan posted bond and was released from jail.

d. On 1 December 1975 the GM, PIAX forwarded to the Chief, SEER for his information and necessary action the Military Police Blotter, Sheriff's Report and a TWX message pertaining to Mr. Sheehan, Tab A. The TWX message was originated by the Provost Marshall, Fort Jackson. The Commander, Fort Jackson and Headquarters, Department of the Army were action addressees. Commander, TRADOC, Fort Monroe and Commander, AAFES were information addressees.

e. On 15 January 1976, Mr. Sheehan's attorney in a letter to the GM, PIAX stated that the allegations against Mr. Sheehan were misdemeanors rather than felonies, that Mr. Sheehan was currently involved in a cooperative effort with the Lexington County Sheriff's Department and that the attorney had strong indications that charges against Mr. Sheehan would be dismissed.

f. Information provided by the South Carolina, 11th Judicial Circuit Solicitor (prosecuting attorney) on 31 January 1976 indicated that Mr. Sheehan was in felony violation of the South Carolina Code of Justice and if convicted would be subject to a maximum sentence of 15 years imprisonment and a maximum fine of $25,000. On 2 February 1976 correspondence relating to the incident and a personnel request (AAFES Form 1200-29) were submitted to this headquarters by the GM, PIAX requesting prior approval to effect separation action, Tab B. Because Mr. Sheehan is an EMP employee, sepa-

ration may not be effected without the prior approval of the Commander, AAFES. Upon the recommendation of the Director, Personnel Division, an investigating official was appointed pursuant to the provisions of paragraph 5-9, AR 60-21/AFR 147-15.

g. On 6 February 1976, Mr. Sheehan provided the GM, PIAX with letters from an Assistant Solicitor, Lexington County, indicating that the earlier information received from the Solicitor concerning the felony charges was in error. One letter recited the same information provided by Mr. Sheehan's attorney on 15 January 1976, referenced above. The GM, PIAX confirmed that the charges against Mr. Sheehan had, in fact, been reduced to misdemeanors and conveyed the information to the Chief, SEER, by letter dated 10 February 1976, Tab C.

h. The report of investigation and recommendation for separation was dated 3 March 1976 and was based upon information dated 13, 18 and 24 February 1976. Although Mr. Sheehan entered his plea of guilty to misdemeanor charges on 1 March 1976 there is no indication that the Investigating Official was aware of such plea; however, the report did take into account the reduction of charges to misdemeanor level. Prior approval was granted.

i. On 16 March 1976 the GM, PIAX advised the Command at Fort Jackson that Mr. Sheehan had been found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. Mr. Sheehan received an 18 month probationary sentence and a $1,000 fine, Tab D. The GM, PIAX also advised that proceedings to separate Mr. Sheehan for cause had been initiated. On 16 March 1976 the Advance Notice of Separation for Cause was issued, Tab E. The charging paragraph is quoted in its entirety; "The reason for your separation is conduct off the job which reflects discredit on the AAFES and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. The specific basis

for this action is that on or about 17 November 1975, at Irmo, South Carolina, you had in your possession approximately: 334 Amphetamine tablets (a Schedule I substance) 11.5 grams of MDA (3, 4 Methylenedioxy Amphetamine—also a Schedule I substance), a quantity of PCP (Phencyclidine Hydrocloride), a Schedule III substance, and 40 marijuana plants. The possession of these drugs and plants is in violation of Title 21, U.S. Code annotated, Section 844. Further, on 1 March 1976, in the Lexington County General Sessions Court, Lexington, South Carolina, you were found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. You were sentenced to 18 months probation and received a $1000 fine." Mr. Sheehan replied to the Advance Notice of Separation verbally on 17 March 1976 and in writing on 19 March 1976, Tab F. In his written reply he requested that he be granted an extension of the reply period and he requested a copy of the CID report referenced in the advance notice of separation. The extension was granted. "A complete copy of the file pertaining to the separation action" *sans* a copy of the CID report was sent to Mr. Sheehan on 26 March 1976 by the General Counsel, this headquarters, Tab G. Mr. Sheehan was directed to the Commander, USACIDC with his request for the CID report.

j. On 26 March 1976 Mr. Sheehan further replied in writing to the Advance Notice of Separation for Cause, Tab H. A 7 April 1976 supplemental reply from Mr. Sheehan to the Advance Notice of Separation was forwarded to the GM, PIAX, and, in turn the GM, PIAX forwarded it to HQ AAFES, Attention: PE-M, Tab I.

k. On 14 April 1976 the Final Decision to Separate was issued to Mr. Sheehan, Tab J. That document recited that the final decision to separate was made ". . . in view of the entire weight of evidence which resulted in your plea of guilty to charges of one count of simple possession of marijuana and three counts of simple possession of illegal drugs . . ." and was based upon ". . . con-

duct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES." Mr. Sheehan replied to the Final Decision to Separate on 23 April 1976 requesting an evidentiary hearing, Tab K. He also requested that Mr. Dennis R. Jones, Chief, Systems Development Branch, Data Systems Division, HQ AAFES be made available to act as his representative. On 11 May 1976 the Director, Data Systems Division advised that Mr. Jones consented to the appointment and was, therefore, made available per the request of Mr. Sheehan, Tab L.

1. On 20 May 1976 the hearing examiner advised Mr. Sheehan that an evidentiary hearing would be scheduled at a later date and asked Mr. Sheehan to specify his desires regarding the place of the hearing, Tab M. On 9 June 1976 Mr. Sheehan requested that the hearing be held in Dallas, Texas at HQ AAFES. On 15 June 1976 the hearing examiner advised Mr. Sheehan that the hearing would necessarily be held at the Piedmont Area Exchange, Fort Jackson, South Carolina based upon advice from the management representative that numerous management witnesses would be called. The hearing was scheduled for 1 September 1976, Tab N.

m. On 7 July 1976 Mr. Sheehan wrote to the hearing examiner objecting to the Commander, AAFES being designated as the appellate authority, Tab O.

n. On 20 July 1976 the hearing examiner received a letter from Mr. Sheehan requesting the evidentiary hearing be cancelled due to a death in his immediate family and requesting that he be permitted to submit a written appeal, Tab P. The request was granted. Mr. Sheehan and the management representative were requested to submit all evidence in the way of statements, affidavits, reports and/or written arguments which they wished to have considered.

o. Both the appellant and the management representative were permitted to examine a copy of the evi-

dence submitted by the opposing party with a further opportunity for any rebuttal, Tab Q. The rebuttal was received from the management representative on 20 September 1976 and from Mr. Sheehan on 4 October 1976, Tab R.

4. Paragraph 97b, reference 1b, provides that the appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination. Accordingly, this report and the attachments are forwarded through that office for review.

5. *Issues.* The factual issues before the hearing examiner were determined to be as follows:

a. Did Mr. Sheehan's conduct off the job on or about 17 November 1975 reflect discredit on AAFES and, if so,

b. Is his retention in any capacity incompatible with the best interests of AAFES, and

c. Were the actions taken by the Army and Air Force Exchange Service in accordance with pertinent laws and regulations?

6. *Analysis.* Immediately prior to the time of his separation for cause the appellant was a UA 13, Shopping Center Manager, Fort Jackson Exchange. Prior to that time he had been an Assistant Chief, Systems Development Branch, HQ AAFES, Dallas, Texas; a Systems Program Specialist, Systems Definition and Procurement Branch, HQ AAFES, Dallas, Texas; a Retail Operations Manager, East Georgia Area Exchange, Fort Gordon, Georgia; and Acting General Manager, Mississippi Area Exchange, Keesler Air Force Base, Mississippi.

7. The basis for the allegations set forth in the Advance Notice of Separation alleges that his possession of the items enumerated constituted a violation of federal law; resulted in his conviction within the jurisdiction of South Carolina; brought discredit upon the Army and Air Force Exchange Service and was of such a nature that his retention in any capacity was incompatible with the

best interests of AAFES. The Final Decision dropped all reference to violation of federal law possibly because the Advance Notice improperly referred to amphetamine as a Class I substance vice a Class III substance (Title 21 USCA Section 812), but more likely simply because it was easier to establish that Mr. Sheehan had entered a plea of guilty in the state court. Failure to reiterate that portion of the initial allegations might well be construed as a determination of that allegation in favor of Mr. Sheehan; however, the hearing examiner considers the original recitation merely surplusage to the allegation of the "conduct".

8. In that regard, it is likewise surplusage whether Mr. Sheehan was convicted or not. The basic allegation made against Mr. Sheehan is that his conduct brought discredit upon the Army and Air Force Exchange Service. The allegation that such conduct constitutes either a violation of federal law and/or a violation of state law is pertinent in terms of the severity with which it is judged by those jurisdictions. The separation action must stand or fall based not only upon the nature of the conduct but also upon whether that conduct brought discredit upon the AAFES. If it did then the hearing examiner must further determine whether the record establishes that the conduct and discredit make Mr. Sheehan's retention in any capacity incompatible with the best interests of AAFES. Felonious conduct, as evidenced by the penalties which may be imposed, and certain crimes involving moral turpitude are such that discredit to the AAFES might be inferred when such conduct is established by credible evidence. The same inference may not be drawn for conduct which is proscribed as a misdemeanor. The violation of which Mr. Sheehan stands convicted in the state jurisdiction (and had he been charged with the same charge of simple possession under the federal law) is classified as a misdemeanor. (Title 18 USCA Section 1.) In spite of the references to "plea

bargaining", which implies greater culpability when none necessarily exists, there is no evidence in this record to reveal that Mr. Sheehan's conduct was other than that established by his pleas of guilty—one case of simple possession of less than one ounce of marijuana and three cases of possession of unlawful drugs. Since the conduct is not, *per se*, such that discredit may be inferred, the actual situation must be considered.

9. The record adequately establishes that personnel at Command level and within the exchange were aware of Mr. Sheehan's arrest within a matter of hours. The record also establishes that the information was at least partially incorrect. The hearing examiner does not question for one moment that the general manager's motives were as recited in his statement of 17 August 1976. He states that . . . "in order to quell rumors, mostly erroneous, that were rampant within a day or two following Mr. Sheehan's arrest among approximately 400 exchange employees at Fort Jackson, the undersigned announced at a staff meeting the true facts concerning the Sheehan matter as they were known to me at the time . . ." It must also be acknowledged, however, that the facts as they were known to him at the time (as evidenced by documents being forwarded to the Southeast Exchange Region at the time) were not accurate and, while they may have mitigated the erroneous information being passed by rumor, the information being given to exchange employees made the incident appear more serious than is now established by the allegations of misdemeanor gravity.

10. The Fort Jackson Command had a legitimate interest in the case because it involved a military man. Neither the briefings by exchange management to Command personnel, (which likewise contained inaccurate information) nor the inaccurate gossip and rumor among exchange employees is deemed to establish discredit to AAFES.

11. The remaining question dealing with whether Mr. Sheehan's retention is incompatible with the best interests of AAFES should still be answered. It is apparent that Mr. Sheehan's effectiveness at the Piedmont Area Exchange would be seriously impaired, if not impossible. There is no reason to believe, however, that the cloud engendered by gossip will necessarily follow him anywhere he might be transferred within the worldwide AAFES nor that it would continue to influence his effectiveness at any new assignment. Mr. Sheehan's record with AAFES has been excellent. His abilities may well be utilized at some other location. His long involvement is not unlike alcoholism and is deserving of consideration equal to that indicated in ESB Number 115.

12. *Findings.* The hearing examiner finds from the evidence that:

a. Mr. Arthur E. Sheehan's conduct off the job on or about 17 November 1975 did not reflect discredit on AAFES.

b. His retention in some capacity is not presently incompatible with the best interests of AAFES.

c. The actions taken by the Army and Air Force Exchange Service were in accordance with pertinent laws and regulations.

13. *Recommendation.* Mr. Sheehan has challenged the propriety of the Commander, AAFES acting as appellate authority in this case because of his prior involvement by way of granting prior approval for the separation. Paragraph 7, reference 1b provides that "Except as provided below, the management official is the official with authority to separate at the AAFES organizational element . . . . to which the employee is assigned.", but that "if the employee is an EMP employee whose EMP status is withdrawn by the Commander, AAFES, or who is suspended or separated by the Commander, AAFES, the management official is the Commander, AAFES." Paragraph 97, same reference, provides that the appellate

authority for all appeals is the Commander, AAFES, unless the Commander, AAFES is the management official.

14. Mr. Sheehan argues, in effect, that the granting of prior approval by the Commander, AAFES constitutes an action tantamount to separation; therefore, the Commander, AAFES is, in effect, the management official and the appellate authority should be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services. The hearing examiner believes that that contention has merit. Failure to accord an appellate review at a level above the Commander, AAFES, on EMP separations will subject this Command to criticism and possible legal action on a charge of lack of administrative due process.

15. Based upon the foregoing analysis and findings, it is recommended that the appeal be granted and that Mr. Sheehan be reinstated to his former grade but that he be transferred to an assignment outside the Southeast Exchange Region. The attached Appellate Authority Action has been prepared to accomplish reinstatement upon your approval. Signature is recommended.

16. If, however, the Commander, AAFES determines the foregoing action to be inappropriate, it is recommended that serious consideration be given to forwarding the entire appellate file together with the report and recommendation of the hearing examiner, with or without an Appellate Authority Action, to the Chairman, Army and Air Force Exchange and Motion Picture Services for review.

/s/ R. J. Birkmeyer
R.J. BIRKMEYER
Hearing Examiner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3 78 0222F

ARTHUR EDWARD SHEEHAN

vs.

ARMY & AIR FORCE EXCHANGE SERVICE,
AN INSTRUMENTALITY OF THE DEPARTMENTS
OF THE ARMY AND THE AIR FORCE

[Filed May 1, 1978]

ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant herein, through the United States Attorney for the Northern District of Texas, and in response to the allegations made in Plaintiff's Complaint responds, by correspondingly numbered paragraphs, as follows:

JURISDICTION

1. Paragraph 1 is jurisdictional in nature and does not require a response; however, to the extent that a response might be required, the Defendant denies that this court has jurisdiction of this case.

PARTIES

2. Admitted.

3. Admitted, except to state that the AAFES is a nonappropriated fund instrumentality of the United States, and a joint major command of the Departments of the Army and of the Air Force, under the specific control of the respective Secretaries of the Army and of the Air Force.

FACTS

COUNT ONE

4. Admitted as to the first sentence, except that Plaintiff was first employed as a Systems Analyst. As to the second sentence, Plaintiff was accepted into the Executive Management Program by the Defendant on 16 January 1968.

5. Admitted.

6. Admitted.

7. Admitted as to the first sentence. As to the remainder of paragraph 7, it contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

8. Admitted.

9. Admitted as to sentences one, three, and four. As to sentence two, denied, as the management official in charge of the separation of Plaintiff was the General Manager, Piedmont Area Exchange.

10. Denied as to the Commander conducting an investigation. Admitted as to the Commander causing to be performed an investigation by a disinterested party.

11. Paragraph 11 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

12. Admitted.

13. Admitted as to sentences one and two. As to sentence number three, the defendant denies that the Hearing Examiner, Mr. Birkmeyer, rendered a decision. Rather, the Hearing Examiner is authorized by regulation to render findings and make recommendations only to the Appellate Authority.

14. Admitted as to finding one of paragraph 14. Denied as to finding two of paragraph 14 where it states, ". . . incompatible with the present interest of AAFES." Admitted, when stated as ". . . presently incompatible with the best interest of AAFES."

15. As to recommendation 1 of paragraph 15, denied. As to recommendation 2 of paragraph 15, admitted. As to recommendation 3 of paragraph 15, denied.

16. Paragraph 16 contains conclusions of law and not averments of facts to which an answer is required, but insofar as an answer may be deemed required, denied.

17. Denied.

18. Paragraph 18 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

19. Paragraph 19 is argumentative in nature and does not contain averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

20. Paragraph 20 is neither admitted nor denied for the reason that this is a prayer for relief that requires neither admission nor denial.

21. As to the first sentence, the Defendant denies that the actions of which the Plaintiff here complains, were willful and/or malicious. As to sentence two, this is a general prayer for relief that requires neither admission nor denial.

COUNT TWO

22. Paragraph number 22 incorporates paragraphs one through twenty-one of Count One and, as such, does not require a specific answer as these paragraphs have been previously answered herein.

23. Admitted.

24. Paragraph 24 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

25. Denied.

26. As to the first sentence of paragraph 26, it is specifically denied that the actions on the part of the defendant were willful and/or malicious. As to the second sentence, this is a prayer for relief for which neither an admission or denial is required.

PRAYER

Paragraphs 1 through 7 of the prayer contained in the complaint are neither admitted nor denied for the reason that they constitute a prayer for relief that requires neither admission or denial.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Plaintiff lacks standing to maintain this action.

3. The Court lacks jurisdiction over the subject matter of this action because it is, in effect, a suit against the United States to which it has not consented.

4. The Court lacks jurisdiction over the person of the Federal Defendant.

5. Plaintiff has failed to join an indispensable party.

6. Defendant avers that the administrative proceedings held herein complied with the controlling procedures and that the admistrative decision to separate Plaintiff from his AAFES position was neither arbitrary nor capricious and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

7. Any and all actions by the Defendant of which Plaintiff complains were done by them as officials of the United States, Department of the Army, and Department of the Air Force in the course of their official duties and were within the scope of those duties, and, for this reason, are absolutely privileged.

8. The complaint does not present a justiciable case or controversy.

9. Mandamus will not lie against the named Defendants to control their exercise of administrative judgments and discretion.

10. Even if Plaintiff prevails in this case, the Plaintiff is not entitled to the recovery of attorney's fees for the reason that there is no statutory provision entitling him to such; and, further, Plaintiff is not entitled to

punitive damages against the United States as there is no statutory provision entitling him to such.

WHEREFORE, premises considered, the Defendant respectfully prays that, upon final hearing of this case, a judgment be entered denying the Plaintiff all relief sought, directing that he take nothing by this suit, awarding costs and reasonable attorney's fees to the Defendant herein.

Respectfully submitted,

KENNETH J. MIGHELL
United States Attorney

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney
1100 Commerce Street
Room 16-G-28
Dallas, Texas 75242
Phone number: 749-1929

Of Counsel:

ARMY AND AIR FORCE EXCHANGE SERVICE
GORDON A. GINSBURG, Colonel, USAF
General Counsel
CARLL J. KRETSINGER, Major, USAF
Assistant General Counsel
3911 Walton Walker Blvd.
Phone number 330-2641
Dallas, Texas 75222

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been mailed, certified, return receipt requested, to Ira E. Tobolowsky at 1900 Southland Center, Dallas, Texas 75201, attorney for Plaintiff, on May 1, 1978.

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3 78 0222 F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, FEDERAL DEFENDANT

[Filed Jul. 21, 1978]

DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The Federal Defendant by the undersigned attorney moves this court to dismiss the complaint herein, or in the alternative to grant Summary Judgment and as its reasons therefor avers as follows:

1. The Court lacks jurisdiction over the Army and air Force Exchange Service, an instrumentality of the United States, for the reason that suit does not lie against such bodies, *EO NOMINE.*

2. The Plaintiff does not have standing to maintain this cause of action.

3. The complaint fails to state a claim within the jurisdiction of this court.

4. Plaintiff has failed to state a claim upon which relief can be granted and further, Plaintiff has suffered no damages for which he is entitled reimbursement.

Respectfully submitted,

KENNETH J. MIGHELL
United States Attorney

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney
1100 Commerce Street
Room 16-G-28
Dallas, Texas 75242
Phone Number 749-1925

Of Counsel:

ARMY AND AIR FORCE EXCHANGE SERVICE
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General Counsel
CARLL J. KRETSINGER, Major, USAF
Assistant General Counsel
3911 Walton Walker Blvd.
Dallas, Texas 75222
Phone Number 330-2641

[SEAL] [SEAL]

DEPARTMENTS OF
THE ARMY AND THE AIR FORCE

HEADQUARTERS ARMY AND AIR FORCE EXCHANGE SERVICE

Dallas, Texas 75222

ACTION OF APPELLATE AUTHORITY

IN RE THE

APPEAL OF ADVERSE ACTION OF MR. ARTHUR E. SHEEHAN

20 December 1976

Date

The appeal of Mr. Arthur E. Sheehan from the Final Decision of the General Manager, Piedmont Area Exchange, concerning the separation for cause is denied.

This decision is final and not subject to further appeal or review.

/s/ C. W. Hospelhorn
C. W. HOSPELHORN
Major General, USA
Commander

IRA E. TOBOLOWSKY
ATTORNEY AT LAW
1900 Southland Center
Dallas, Texas 75201

(214) 742-9205
January 18, 1978

Major General Bobby Presley
Commander of AAFES
Dallas, Texas 75222

Re: Arthur Edward Sheehan vs. Army and Air Force Exchange Service, an Instrumentality of the Departments of the Army and the Air Force

Dear Major General Presley:

Please be advised that I have been retained by Arthur Edward Sheehan to represent him in the above referenced matter. Mr. Sheehan was in the Executive Management Program and was separated effective 19 April, 1976. Mr. Sheehan contends that his separation was unlawful, in violation of AAFES rules, regulations, and policies, that he was denied due process of law, and that the final decision to separate him was arbitrary, capricious, and an abuse of discretion. Although these are Mr. Sheehan's general complaints, the specific complaints are set forth in particular and in detail in the Complaint, a copy of which I have enclosed.

I have previously discussed this matter with Colonel Ginsburg, General Counsel, and have been supplied, pursuant to the Freedom of Information Act, information concerning this matter. In my recent discussion with Colonel Ginsburg, he requested some time to discuss this matter with you before I filed this suit. I have therefore agreed to withhold the filing of this suit until Wednesday, February 1, 1978. I would appreciate hearing from you

or Colonel Ginsburg before February 1, 1978, if you are interested in attempting to resolve this matter without the necessity of suit.

By copy of this letter I am forwarding a copy of the Complaint to Colonel Ginsburg.

Since the exhibits are bulky, and since Colonel Ginsburg is in possession of these exhibits, I have deleted them from the petition.

Although I have attempted to identify with particularity the exhibits to be attached, if you or Colonel Ginsburg have any trouble determining which exhibits are the correct ones, please contact me.

Yours very truly,

/s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY

IET/ms

encl.

c: Colonel Gordon A. Ginsburg
Mr. Arthur Edward Sheehan

[SEAL] [SEAL]

DEPARTMENTS OF
THE ARMY AND THE AIR FORCE

HEADQUARTERS ARMY AND AIR FORCE EXCHANGE SERVICE

Dallas, Texas 75222

8 Feb. 1978

SUBJECT: Appeal of Adverse Action—
Mr. Arthur E. Sheehan

Lieutenant General Charles E. Buckingham
Chairperson
Board of Directors
Army and Air Force Exchange Service
Room 4E128, The Pentagon
Washington, D.C. 20330

1. At Inclosure 1 is the Hearing Examiner's report in the Appeal of Adverse Action by Mr. Arthur E. Sheehan. Mr. Sheehan, a UA 13 EMP employee, was separated for cause on 19 April 1976. He appealed his separation and the former Commander, AAFES took final action denying the appeal on 20 December 1976.

2. The Hearing Examiner's report in the appeal of adverse action by Mr. Arthur E. Sheehan is submitted for your action as Appellate Authority in accordance with paragraph 97, ESE 247, 2 July 1975. I believe this is required because in this case the former Commander, AAFES, as a result of his prior approval of Mr. Sheehan's separation was, in effect, the Management Official responsible for separating Mr. Sheehan. At Inclosure 2

is a memorandum from my General Counsel supporting this position. At Inclosure 3 is a letter received from the attorney representing the appellant.

/s/ Bobby W. Presley
BOBBY W. PRESLEY
Major General, USAF
Commander

3 Inclosures
As stated

[SEAL]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
Washington, D.C. 20324

27 Feb. 1978

REPLY TO THE ATTN OF: JACM

SUBJECT: Appeal of Adverse Action—Mr. Arthur E. Sheehan

To: AF/AC (Lt General Buckingham)

1. As requested, we have reviewed the file regarding the separation for cause of Mr. Sheehan.

2. The facts of the case are adequately set forth in the Hearing Examiner's report as well as in the General Counsel's review and need not be restated here. The issues presented to you as Chairperson, Board of Directors, AAFES, are two-fold: (1) does the record support the adverse action; and (2) are you the appellate authority in this case?

3. In our opinion, both questions may be answered in the affirmative. There is sufficient evidence in the file to substantiate that Mr. Sheehan's conduct reflected discredit upon AAFES and was such that his continued retention was incompatible with the best interests of AAFES. As to the second question, we agree with Major General Presley and the General Counsel, AAFES, that the former Commander's action in granting prior approval for the separation was sufficient to disqualify him for action as the appellate authority. Accordingly, it is appropriate for you to act in this case.

4. Based upon our review of the file, we recommend that the appeal be denied. In this regard, we note that Mr. Sheehan's attorney has indicated an intention to initiate litigation should the appeal be finally denied (Enclosure 3 to General Presley's letter). For your information, should a complaint be filed in this case, the litigation would be handled by the Department of the Army inasmuch as the case arose at Fort Jackson, South Carolina.

/s/ James Taylor Jr.
JAMES TAYLOR JR.
[Illegible]
[Illegible]
United States Air Force

[SEAL]

BOARD OF DIRECTORS
ARMY AND AIR FORCE EXCHANGE SERVICE
DEPARTMENTS OF THE ARMY AND THE AIR FORCE
Washington, D.C. 20310

ACTION OF APPELLATE AUTHORITY

IN RE THE
APPEAL OF ADVERSE ACTION OF MR. ARTHUR E. SHEEHAN

2 Mar 1978
Date

The appeal of Mr. Arthur E. Sheehan from the Final Decision of the General Manager, Piedmont Area Exchange, concerning the separation for cause is denied.

This decision is final and not subject to further appeal or review.

/s/ Charles E. Buckingham
CHARLES E. BUCKINGHAM
Lt. General, USAF
Chairperson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT

[Filed Feb. 13, 1979]

NOTICE OF APPEAL

Notice is hereby given that Arthur Edward Sheehan, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order Granting Defendant's Motion to Dismiss entered in this action on the 15th day of January, 1979.

Respectfully submitted,

LAW OFFICES OF IRA E. TOBOLOWSKY

By /s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY
2200 Fidelity Union Tower
Dallas, Texas 75201
214/748-9312

SUPREME COURT OF THE UNITED STATES

No. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

v.

ARTHUR EDWARD SHEEHAN

ORDER ALLOWING CERTIORARI

Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357612 671